No. 94-1837

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
PETITIONER

v.

TOM GALLAGHER, FLORIDA INSURANCE
COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE COMPTROLLER OF THE CURRENCY AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether 12 U.S.C. 92 (Supp. V 1993), which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts a state law that prohibits most such banks from engaging in most insurance agency activities.

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INTEREST OF THE UNITED STATES AND THE COMPTROLLER OF THE CURRENCY

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 21 *et seq.* See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by Congress, including the power to engage in insurance agency activities set out in 12 U.S.C. 92 (Supp. V 1993). The United States

also has an interest in the proper interpretation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, on which the court of appeals relied in holding that Section 92 does not preempt the state law at issue here.

The Comptroller participated as an amicus curiae before the court of appeals in this case. The United States, on the Comptroller's behalf, also intervened as a party in *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994) (time for filing petition for a writ of certiorari extended, No. A-916 (June 1, 1995)), which held that Section 92 preempts a Kentucky statute that purports to restrict the insurance agency activities of national banks in much the same way as the Florida statute at issue in this case. The Comptroller has participated as a party in two recent cases in this Court concerning the validity and scope of Section 92. See *NationsBank of North Carolina, supra*; *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173 (1993). The United States has participated in numerous cases involving interpretation of the McCarran-Ferguson Act. See, *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 113 S. Ct. 2891 (1993); *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202 (1993).

STATEMENT

1. Belleview, Florida, is a town with fewer than 5,000 inhabitants. Petitioner Barnett Bank of Marion County, N.A., is a national bank with a branch in Belleview. Petitioner is a wholly owned subsidiary of Barnett Banks, Inc., a Florida bank holding company. Pet. App. 20a; see also Pet. ii.

In October, 1993, petitioner purchased the assets and business of Linda Clifford Insurance, Inc. (LCI), an insurance agency also located and doing business

in Belleview. LCI's employees, including Clifford herself, became employees of petitioner. Pet. App. 20a. Four days after the purchase, respondent Gallagher, the state Insurance Commissioner, ordered Clifford and LCI to cease and desist from engaging in any "insurance agency activity." *Id.* at 19a. Respondent relied on Fla. Stat. Ann. § 626.988 (West Supp. 1995) (*reprinted at* Pet. 4-5), which generally prohibits an otherwise licensed insurance agent from engaging in "insurance agency activities" if he or she is associated in any way with a "financial institution." Under the statute, "insurance agency activities" include the sale or servicing of insurance policies other than credit life or credit disability policies, and the term "financial institution" includes (among other things) most banks and bank holding companies, including petitioner. Fla. Stat. Ann. § 626.988 (1)(a) and (b) (West Supp. 1995).[1]

2. Petitioner sued respondents Gallagher and the Florida Department of Insurance for declaratory and injunctive relief, contending that federal law preempts application of Section 626.988 to prohibit petitioner's operation of LCI. Petitioner relied on Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 92 (Supp. V 1993), which provides that any national bank located and doing business in a

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[1] The statute excludes from the definition of "financial institution" any bank holding company exempted from regulation by the Federal Reserve Board under Section 4(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(d) (relating to companies that have held a small bank since before July 1, 1968), and any bank "which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." Fla. Stat. Ann. § 626.988(1)(a) (West 1995). Neither exclusion applies to petitioner.

place with no more than 5,000 inhabitants may, under supervision by the Comptroller, "act as the agent for any fire, life, or other insurance company" that is authorized to do business in that State. See Pet. App. 18a.

The district court denied petitioner's request for relief. Pet. App. 17a-36a. The court recognized that Section 626.988 was inconsistent with Section 92. Pet. App. 23a-24a. However, the court accepted respondents' argument that Section 626.988 was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 25a-35a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The district court first concluded that Section 626.988 was enacted "for the purpose of regulating the business of insurance." Pet. App. 26a-32a. The court then held that Section 92 does not "specifically relate[] to the business of insurance," and that it "fails to manifest any express intent to preempt state insurance laws." *Id.* at 32a-35a. The court accordingly sustained the State's application of Section 626.988 to prevent petitioner from operating LCI.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first held that it had jurisdiction to decide petitioner's claim. *Id.* at 5a-6a. The court then examined Florida law (*id.* at 8a-13a), and concluded that the aim of Section 626.988 is to protect insurance policyholders by preventing "the loss of arm[']s-length transactions and objectivity" that might occur when "[a] bank becomes involved with insurer and insured." Pet. App. 12a. The court therefore agreed that Section 626.988 "regulates the

business of insurance" for purposes of the McCarran-Ferguson Act.

Turning to 12 U.S.C. 92 (Supp. V 1993), the court concluded (Pet. App. 13a-15a) that the history of that Section, and its relationship to the National Bank Act and the Federal Reserve Act, indicated that in enacting it "Congress was concerned with banking, not insurance." *Id.* at 15a. On that basis, the court also agreed with the district court's determination that Section 92 neither "specifically relates to the business of insurance" nor otherwise "specifically requires" the preemption of conflicting state laws. Pet. App. 15a (quoting 15 U.S.C. 1012(b) and *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2211 (1993)).

ARGUMENT

The decision below is incorrect, and conflicts with a decision of another federal court of appeals. The question presented is one of substantial importance to the Comptroller of the Currency, as the primary regulator of banks chartered under the National Bank Act; to national banks themselves; to those engaged in the business of insurance; to the state regulators primarily charged with regulating that business; and to consumers of insurance products throughout the country. The matter therefore warrants review and resolution by this Court.

1. Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 32 (Supp. V 1993), provides in relevant part that national banks

> located and doing busines in any place the population of which does not exceed five thousand inhabitants * * * may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire,

> life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent.

Petitioner, a national bank doing business in a small Florida town, relied on the explicit federal-law authority reflected in Section 92 when it acquired and attempted to operate a local insurance agency. It was prevented from conducting the agency's business by state insurance authorities, who relied on a state law that prohibits sales of most types of insurance by agents associated with a small-town bank that, like petitioner (and like most other national banks), is owned by a bank holding company. Fla. Stat. Ann. § 626.988 (West Supp. 1995).

As both courts below acknowledged (see Pet. App. 3a, 8a, 23a-24a), the federal and state laws on which the parties respectively rely are in irreconcilable conflict. Resolution of the question presented therefore depends on whether normal principles of preemption are superseded by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). In applying McCarran-Ferguson to this case, the court of appeals held that Fla. Stat. Ann. § 626.988 (West Supp. 1995) was "enacted * * * for the purpose of regulating the business of insurance," and that 12 U.S.C. 92 (Supp. V 1993) does not "specifically relate[] to the business of insurance." The court erred on both counts.

a. Section 626.988 does not affect how the insurance business is conducted in Florida. It imposes no

standard, and requires or forbids no practices, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and insured." See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982); *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388, 391-392 (*reprinted at* Pet. App. 39a, 46a-47a). Instead, it regulates the conduct of "financial institutions," including certain national banks, by prohibiting them, under most circumstances, from acting as or affiliating with insurance agents, even if they comply with all the State's generally applicable rules and regulations governing the conduct of such agents or the insurance business. Moreover, in the case of small-town banks, that prohibition applies only to banks that are "subsidiar[ies] or affiliate[s] of a bank holding company," and therefore amounts to regulation, not of the bank's insurance activities, but of its ownership structure. Section 626.988 was therefore not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act; it was enacted for the purpose of regulating the business of banking.

With the exception of the court below in this case, the federal courts of appeals have uniformly concluded that state laws restricting the insurance activities of national banks do not regulate the business of insurance, and therefore do not fall within McCarran-Ferguson's protections. In addition to the *Owensboro* decision, discussed below, which conflicts directly with the decision in this case, the court in *First Nat'l Bank of E. Arkansas* v. *Taylor*, 907 F.2d 775, 779-780 (8th Cir.), cert. denied, 498 U.S. 972 (1990), concluded that a State could not apply its

restrictions on the sale of insurance to the sale of debt cancellation contracts by national banks, primarily because the Comptroller had construed the general banking powers conferred by 12 U.S.C. 24 Seventh (1988 & Supp. V 1993) to permit national banks to sell such contracts. The court rejected the State's argument that McCarran-Ferguson prevented preemption of its rules, observing that that Act "was not directed at the activities of national banks," and that where contract sales were authorized by federal law they "[did] not constitute the 'business of insurance' " within the meaning of Section 1012(b). *First Nat'l Bank of E. Arkansas*, 907 F.2d at 779.

Similarly, in *United Services Auto. Ass'n* v. *Muir*, 792 F.2d 356 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987), the court of appeals considered an insurance company's suit to enjoin state regulators from revoking the company's license on the ground that its purchase of a bank was in violation of a state statute prohibiting mergers between financial institutions and insurance companies. In rejecting the State's claim that the McCarran-Ferguson Act protected its statute from preemption, the court emphasized that "affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer." 792 F.2d at 364. As the court concluded, laws such as Pennsylvania's "have no part in the business of insurance under McCarran-Ferguson." *Ibid.* See also *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170-1171 (D.C. Cir. 1979) (upholding Comptroller's regulation of disposition of income from sale of credit life insurance by national banks: "Nothing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate 'unsafe and unsound' banking practices

of national banks."), cert. denied, 449 U.S. 823 (1980).

In holding that Section 626.988 was enacted "for the purpose of regulating the business of insurance," the court of appeals here purported to apply the standards set out by this Court in *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202 (1993), and *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969). See Pet. App. 9a-13a. As both *Fabe* and *National Securities* make clear, however, "the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance.' "). On that basis, *Fabe* held that a state law governing priority of claims in bankruptcy came within the scope of McCarran-Ferguson only to the extent that it protected policyholders, because to that extent it was "integrally related to the performance of insurance contracts." 113 S. Ct. at 2209. *National Securities* held that a law requiring the state insurance commissioner to certify that an insurance company merger was not inequitable to stockholders fell outside the scope of Section 1012(b), because in requiring that approval the State was "not attempting to secure the interests of those purchasing insurance policies," but rather had "focused its attention on stockholder protection." 393 U.S. at 460.

In this case, the court of appeals held that Section 626.988 "protects policyholders" because it safeguards "the financial stability of insurance companies" by preventing improper "pressures" that "could force an insurer to assume a bad risk to quickly consum-

mate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit." Pet. App. 12a-13a. Those are implausible motivations for the enactment of a broad ban on bank-related insurance agencies. The risk that an agent might sell customers "unnecessary insurance" (which could, of course, only *enhance* the "financial stability" of the insurer) has no evident connection to whether or not the agent is somehow related to a bank (let alone to whether the bank, in turn, is owned by or affiliated with a bank holding company). Similarly, it is unlikely that in enacting Section 626.988 the State was actually concerned with the speculative risk that a bank might attempt to "tie" the availability of a commercial loan to an insurer's willingness to take imprudent underwriting risks, let alone the even more remote risk that it might succeed in doing so.[2]

We do not mean to suggest that the legislative goals suggested by the court of appeals are so insubstantial that the state law, considered by itself, is not a rational exercise of the State's general legislative powers. If challenged under the Fourteenth Amendment, a State's economic and commercial regulations

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[2] State law separately prohibits tying the extension of credit to the purchase of insurance. Fla. Stat. Ann. § 626.9551 (West 1984). And federal law prohibits national banks from tying the extension of credit to the purchase of any other product. 12 U.S.C. 1972 (1988 & Supp. V 1993). We also note that Section 626.988's restrictions do not apply to any small-town bank not owned by a holding company; to certain exempted bank holding companies; or to agents affiliated with non-bank subsidiaries engaged in certain insurance agency activities permitted under the Bank Holding Company Act. Fla. Stat. Ann. § 626.988(1)(a) and (3) (West Supp. 1995). The court of appeals offered no explanation for those exceptions.

are presumed to be valid; any inquiry into the legislature's "actual" purposes is generally inappropriate, and the question is only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller* v. *Doe*, 113 S. Ct. 2637, 2642-2643 (1993) (quoting *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)). As the court of appeals pointed out (Pet. App. 11a-12a), a state appellate court has twice held that Section 626.988 meets that undemanding standard, based on hypothetical legislative purposes much like those posited by the court in this case. *Glendale Fed. Sav. & Loan Ass'n* v. *State*, 587 So. 2d 534, 536-537 & n.1 (Dist. Ct. App. 1991), review denied, 599 So. 2d 656 (Fla. 1992); *Production Credit Ass'ns of Florida* v. *Department of Insurance*, 356 So. 2d 31 (Fla. Dist. Ct. App. 1978).

This case involves quite a different sort of challenge. The state law in question, as applied to petitioner, conflicts with a federal law, and to that extent it is presumptively *in*valid. Its application to petitioner may be upheld only if the law meets the requirements of 15 U.S.C. 1012(b), which specifically mandates an inquiry into the State's "purpose" in enacting it. See *Fabe*, 113 S. Ct. at 2209-2210 & n.6 (emphasizing "purpose" requirement). That inquiry is practical and realistic, not merely conjectural. Cf. *National Securities*, 393 U.S. at 457, 460 (focusing on State's actual purpose in enacting law restricting insurance company mergers).

"The selling * * * of policies * * * and the licensing of * * * agents" can be part of the "business of insurance" for purposes of the McCarran-Ferguson Act. See *National Securities*, 393 U.S. at 460. In this case, however, Section 626.988 precludes an entire class of otherwise qualified (indeed, otherwise

already licensed) insurance agents from selling almost any kind of insurance, solely because they are affiliated with a national bank that is owned, in turn, by a bank holding company. If the State was actually concerned, as the court of appeals suggested (Pet. App. 12a), either with coercive bank lending practices or with banks' taking advantage of their customers, then Section 626.988 is best characterized (as discussed above) as an effort to regulate the business of banking, not the business of insurance. The most plausible explanation for the rule against bank affiliation is, however, a desire to protect other insurance agents from competition from agents affiliated with banks. See *United Services Auto. Ass'n* v. *Muir*, 792 F.2d at 364. Such a law is not "aimed at protecting or regulating," even "indirectly," "the relationship between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The crucial point is that here the State * * * is not attempting to secure the interests of those purchasing insurance policies."); *Muir*, 792 F.2d at 364 ("affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer"). In either case, Section 626.988 was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of Section 1012(b).

b. Thus, we think the court of appeals erred in concluding that Section 626.988 satisfied the first requirement for protection from preemption under the McCarran-Ferguson Act. If the court of appeals was correct, however, then 12 U.S.C. 92 (Supp. V 1993) nonetheless preempts application of the state law to petitioner. McCarran-Ferguson defeats the preemptive effect of federal law only if the state law was enacted for the purpose of regulating the business of

insurance *and* if the federal law does not specifically relate to that business. If the court of appeals was correct that Section 626.988 regulates "the business of insurance" within the meaning of McCarran-Ferguson, then Section 92 "specifically relates to the business of insurance" for purposes of that Act.

Section 92 provides that any national bank located in a place with no more than 5,000 inhabitants may "act as the agent for any fire, life, or other insurance company" otherwise authorized to do business in the relevant State, "by soliciting and selling insurance and collecting premiums on policies," and "may receive for services so rendered such fees or commissions as may be agreed upon * * * [with] the insurance company for which [the bank] may act as agent." Apart from authorizing the Comptroller to prescribe "such rules and regulations" as he deems necessary to regulate those activities, the statute adds two specific provisos: The bank may guarantee neither the payment of any premium on a policy issued through its agency, nor the truth of any statement made by a customer in applying for insurance. The word "insurance" appears in the statute five times. Despite these detailed provisions concerning the insurance agency activities in which certain national banks may engage, the court of appeals concluded (Pet. App. 13a-15a) that Section 92 does not "specifically relate[] to the business of insurance."

The court emphasized Section 92's relationship to the National Bank Act and the Federal Reserve Act, and remarked that "[b]oth Acts concern banking, not insurance." The court also observed that when Congress enacted Section 92, regulation of the business of insurance was thought to lie beyond the scope of federal power under the Commerce Clause. The court then held that, in enacting Section 92, "Con-

gress could not have been attempting to regulate a business that it believed it had no power to regulate." Rather, in the court's view, "Congress was concerned with banking, not insurance." Pet. App. 14a-15a.

The court's reasoning is unpersuasive. Section 1012(b) permits preemption by any federal law that "specifically relates" to the insurance business. Whatever else Congress may have thought when it enacted Section 92, it surely sought to authorize national banks located in small towns to act as insurance agents.[3] If Florida's effort to preclude such banks (when owned by or affiliated with holding companies) from selling insurance is correctly characterized as being for the purpose of regulating "the business of insurance," then Congress's express permission for them to do so must certainly "specifically relate[]" to the same business.

The court's contrary holding is internally inconsistent. It would be plausible to hold that both Florida's attempt to restrict banks from acting as insurance agents, and Section 92's limited permission to certain banks to do so, are laws that "concern banking, not insurance." Pet. App. 14a-15a. In that case, the McCarran-Ferguson Act has no application, and federal law prevails. Alternatively, one could plausibly conclude both that the state law was enacted to regulate, and that the federal law relates to, "the business of insurance," in which case McCarran-Ferguson allows preemption by its terms. It is wholly implausible, however, to treat the state law at issue here as one enacted to regulate the insurance business, while holding that the conflicting federal law does not even "relate" to that business. And the McCarran-Ferguson Act, which was enacted 32 years after Section 92 in an effort to restore the status quo concerning state insurance regulation after this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), could not have been intended to allow individual States to override an express (and previously unquestioned) congressional grant of authority to national banks. See *First Nat'l Bank of E. Arkansas*, 907 F.2d at 779-780.[4]

2. The decision below conflicts directly with the Sixth Circuit's decision in *Owensboro Nat'l Bank* v. *Stephens*, *supra* (*reprinted at* Pet. App. 39a-64a).[5] *Owensboro* held that Section 92 preempts a Kentucky statute, Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988), to the extent that the state law would otherwise prohibit national banks in small towns from

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[3] Nor is or was there any question of Congress's power to grant that authorization, subject both to supervision by the Comptroller and to the operation of "general and undiscriminating state laws" that "do not conflict with the letter or the general objects and purposes of Congressional legislation." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 290 (1896); see also, *e.g.*, *id.* at 283; *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33 (1875); *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903); *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 667-668 (1899).

[4] With respect to the purposes underlying enactment of the McCarran-Ferguson Act, see, *e.g.*, *Fabe*, 113 S. Ct. at 2207; *National Securities*, 393 U.S. at 459; H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945); 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

[5] As discussed above, the decision is also in substantial tension with the decisions in *First Nat'l Bank of E. Arkansas* v. *Taylor*, *supra*; *United Services Auto. Ass'n* v. *Muir*, *supra*; and *Independent Bankers Ass'n of America* v. *Heimann*, *supra*.

"act[ing] as insurance agent or broker with respect to any insurance" except credit life, credit health, or mortgage-related real property insurance. In contrast to the court in this case, the Sixth Circuit held that a state law restricting the ability of banks and bank holding companies to act as insurance agents does not have the "purpose of regulating the business of insurance" for purposes of 15 U.S.C. 1012(b). "Excluding a person from participation in an activity," the court explained, "is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity." Pet. App. 48a. Because the Kentucky law "in no way governs the manner in which the activities constituting the 'business of insurance' are conducted," the court concluded, it was "enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance." *Id.* at 49a.

Owensboro's holding cannot be reconciled with that of the court below. As construed for purposes of decision (see Pet. App. 44a), the state statutes involved in this case and in *Owensboro* differ only in insignificant details. The Sixth Circuit's conclusion that Kentucky's non-affiliation law did not fall within the scope of the McCarran-Ferguson Act was not based on any special feature of that law, and there is no reason to believe that the *Owensboro* court would have found the Act any more relevant to the Florida statute at issue in this case.[6]

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[6] The Sixth Circuit's resolution of the first question under the McCarran-Ferguson Act made it unnecessary for the court to consider whether Section 92 "specifically relates" to the business of insurance for purposes of that Act.

The decisions in these cases thus leave national banks, the Comptroller, state insurance regulators, and consumers subject to different legal regimes from State to State. Moreover, because the issue is one of considerable commercial importance, it can be expected to arise in other States and in other circuits. See Pet. 6 n.1 (citing state laws imposing restrictions in apparent conflict with Section 92); *First Advantage Ins., Inc.* v. *Green*, 652 So. 2d 562 (Ct. App.) (McCarran-Ferguson protects Louisiana statute from preemption by Section 92), review denied, 654 So. 2d 331 (La. 1995); *Shawmut Bank* v. *Googins*, No. 3:94-CV-146 (JAC) (D. Conn.) (motion for summary judgment pending). The existing conflict is therefore only likely to deepen over time. Moreover, there is no reason to believe that further exploration of the matter in the lower courts would materially assist this Court in its consideration of the issue.

3. The decision below permits significant and unwarranted state interference with activities that Congress has specifically authorized national banks to undertake, and with the Comptroller of the Currency's discharge of his "primary responsibility" for the supervision and regulation of those activities. See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995); see also 12 U.S.C. 92 (Supp. V 1993) (subjecting banks' insurance acivities to "such rules and regulations as may be prescribed by the Comptroller"). The Comptroller believes that agency sales of insurance represent a safe and important line of business for banks that can contribute materially to their overall safety and soundness. Moreover, in the Comptroller's view, state restrictions that prevent national banks located in small towns from exercising the in-

surance agency powers specified in Section 92 can put those banks at a serious disadvantage in the increasingly competitive market for financial services of all kinds. Finally, both the Comptroller and the United States are concerned that state restrictions of the type at issue here may operate to restrict competition, to the detriment of consumers, without significant countervailing consumer protection benefits. The question presented is therefore of considerable importance, and warrants resolution by this Court.

4. The appellants below in *Owensboro* have sought and obtained an extension of time "to complete preparation of [their] petition for a writ of certiorari" in that case. A-916 App. for Ext. of Time 4 (granted June 1, 1995). The Comptroller was a respondent below in *Owensboro*, and we will respond to any petition that is filed in that case. In our view, however, this case is a better vehicle than *Owensboro* for this Court's consideration of the preemption issue, for two reasons. First, the court of appeals in this case, unlike the court in *Owensboro*, found it necessary to reach both of the questions that may be pertinent under the McCarran-Ferguson Act: Whether the state law in question was "enacted * * * for the purpose of regulating the business of insurance," and whether Section 92 "specifically relates" to that business. Although this Court might well, like the *Owensboro* court, resolve this case on the basis of the first question, it would appear preferable to grant review in a case in which the court below considered and decided both questions.

Second, we note that *Owensboro* was decided on the assumption that the state law at issue in that case, which by its terms applies to bank holding companies, also applied to the national bank plaintiffs.

See Pet. App. 44a. While we have no reason to question that assumption, it appears that the question has not been settled as a matter of state law. *Ibid.* The *Owensboro* court noted that there appeared to be no question of justiciability, *id.* at 42a n.1, but it might be preferable for this Court to grant review in a case in which the applicability of the challenged state statute to the party before it is unmistakably clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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